Essays on Law and War at the Fault Lines

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Preface

In 1952, Sir Hersch Lauterpacht, then the Whewell Professor of International Law at the University of Cambridge, famously suggested that "if international law is the vanishing point of law, the law of war is at the vanishing point of international law". The renowned scholar, who later served on the International Court of Justice, was merely echoing Cicero's famous dictum, *inter arma leges silent*—in war the law is silent. Sadly, similar cynicism continues to animate discourse on the law of armed conflict.

Although Lauterpacht's grim assertion might well have seemed accurate in the aftermath of the Second World War's horrific carnage, subsequent history has proven him wrong. Today, the laws of armed conflict are enforced in domestic courts, international *ad hoc* tribunals and the International Criminal Court, while the International Court of Justice appears increasingly comfortable dealing with use of force issues. A globalized media focuses attention on purported violations of the law of armed conflict, a robust network of non-governmental organizations exists to monitor hostilities and advocate on behalf of its victims, and governments are increasingly sensitized to the value of compliance with this body of law. True, law of armed conflict violations continue to occur; any hope of their demise in the foreseeable future is naïve. Nevertheless, in the twenty-first century, law exerts an influence on the behaviour of States and its military forces to an unprecedented degree

Much as law influences conduct on the battlefield, changes in the nature of war affect the law governing it, for law and war exist in a symbiotic relationship. New tactics, strategies and technologies may influence law in three ways. First, they may cause outdated law to fall into desuetude. Such is the case, for example, with Article 60 of the 1949 Third Geneva Convention, which requires prisoners under the rank of sergeant to be paid eight Swiss Francs monthly. Second, emergent methods and means of warfare may reveal real or imagined normative lacunae, as is the case, many assert, with conflicts between States and transnational non-State actors like terrorists. Finally, law may prove difficult to interpret and apply in the context of evolving warfare because law typically develops in response to war rather than in anticipation of it. For instance, the use of unmanned aerial vehicles

to conduct attacks has raised interesting questions about the legal requirement to take precautions to minimize harm to civilians and civilian objects.

This collection of essays explores such fault lines in the law of armed conflict. It is less a compilation of articles that have drawn particular attention over the years, than a republication of those which continue to bear on the complex interplay between warfare and law. In terms of approach, the influence of the New Haven School of international law should be apparent, for it abjures rigidly positivist analysis. To be relevant law must be understood in context; it is less the precise "black-letter" rules that matter, than their interpretation and application by States and other relevant international actors. These essays resultantly proceed from an examination of the nature of the warfare to a consideration of how relevant norms are likely to be understood and implemented in that defined environment.

The book is comprised of 12 chapters divided into four parts, each dealing with distinct realms of interaction between law and conflict.

Part I scrutinizes two issues of currency in the *jus ad bellum*, that facet of the law of armed conflict which governs when it is that States may resort to force as an instrument of their national policy… and when they may not. Chapter 1 explores computer network attack (CNA), a topic of particular prominence in light of chronic attacks against government computer networks over the past decade, the massive denial-of-service attacks targeting NATO member Estonia in 2007, and the use of CNA by both sides during the 2008 Georgia–Russia war. It essentially responds to two related questions: when does a computer network attack constitute an unlawful use of force in violation of Article 2(4) of the United Nations Charter and when is it an "armed attack" that allows a victim State to respond forcefully in self-defence pursuant to Article 51 and customary international law?

Chapter 2 examines transnational terrorism against States, a topic brought into tragic focus by the attacks of 11 September 2001, and the response of States thereto. Do such acts rise to the level of a threat to the peace, breach of peace or act of aggression pursuant to Article 39 of the Charter, thereby empowering the Security Council to mandate non-forceful or forceful remedial action? Do attacks by non-State actors constitute "armed attacks" under Article 51, against which States may forcefully respond beyond, or in concert with, the law enforcement paradigm, and without a Security Council mandate? When may transnational terrorism be treated as attributable to a State to the extent that a defensive armed response against the State sponsor is lawful? Post-9/11 pronouncements by the International Court of Justice, particularly those in the *Wall* (2004) and *Congo v. Uganda* (2005) cases, have resparked debate over these issues and make their re-examination timely. The chapter also analyzes the controversial right of States to conduct cross-border operations against terrorists without the acquiescence of the State into which they are mounted. Continuing US strikes into Pakistan and isolated attacks on individual terrorists, such as the 2002 operation in Yemen, are illustrative.

Parts II through IV examine issues of the *jus in bello* (international humanitarian law), the body of law which governs how force may be employed on the

battlefield and which sets forth protections for civilians, prisoners of war, those *hors de combat* and civilian objects. It is wholly distinct from the *jus ad bellum*; the fact that a State may have been the victim of an act of aggression by another does not relieve it of the obligation to comply with the *jus in bello*. Equally, that a State has violated the *jus ad bellum* has no bearing on the protections its soldiers and civilians enjoy under the *jus in bello*.

The law governing the "conduct of hostilities" is examined in Part II. The phrase "conduct of hostilities", an international humanitarian law (IHL) term of art, refers to "how" military operations, particularly attacks, may be conducted. Chapter 3 addresses IHL's foundational premise—that all such law represents a delicate balance between the need of States to be able to effectively conduct warfare (military necessity) and their desire to limit its destructiveness (humanity). The concept of military necessity is often misinterpreted as either a justification for deviation from legal norms or as a factor that limits military operations beyond the strict confines of accepted IHL rules. The former misinterpretation risks becoming an exception that swallows all the rules; the latter is likely to be perceived by States as an unjustifiable threat to their ability to engage in military operations, and thereby would engender disrespect for the law on the part of States and their armed forces. Understanding that military necessity and humanitarian considerations are already counterpoised in the law helps avoid these pitfalls, and thereby facilitates accurate interpretation and application of the law. The chapter examines this evolving balance and the contemporary influences on it.

Attention moves from theoretical matters to law as applied on the battlefield in Chap. 4, which considers what was labelled in the late 1990s as the "revolution in military affairs". It is a revolution that is now deeply imbedded in modern conflict. The resulting changes in the nature of warfare have dramatically affected, and continue to shape, the principle of discrimination. Discrimination bans the use of indiscriminate weapons and, more importantly, limits how discriminate weapons may be employed by requiring attackers to distinguish between civilians and combatants and between military objectives and civilian objects. Further, it both prohibits attacks expected to cause harm to civilians that is excessively relative to the anticipated military advantage and requires attackers to take precautions to minimize unintended collateral damage. The chapter asks how factors like the transformation of battlefields into "battlespaces", the advent of widespread precision attack capability and the increasing transparency of enemy forces have impacted application of these norms.

Chapter 5 narrows the focus to the law governing attack. It represents a by-product of the *Harvard Air and Missile Warfare Manual* project, with its many debates between participating experts over the precise parameters of targeting law. The chapter examines, *inter alia*, such persistent controversies as the scope of military objectives, the propriety of attacking civilian morale, the definition of the term "attack", "zero casualty" warfare, decapitation strikes, human shields, and the concept of "feasible" precautions in attack. All remain to be definitively resolved, and all lie at the very core of IHL. They represent the practical expressions of the military necessity—humanity balance discussed in Chap. 3.

Part III takes up contentious "methods of warfare". Chapter 6 considers aerial blockades, a topic raised by the aerial embargos imposed by the United Nations in its 1990 effort to force the Iraqi withdrawal from Kuwait. Drawing on neutrality law, the law of the sea, United Nations Charter law and IHL, it is of relevance to any sort of aerial operation designed to limit or preclude flights. Thus, it bears on such contemporary matters as the use of force against hijacked civil aircraft and the imposition of "no-fly zones", like that over Libya pursuant to Security Council Resolution 1973 (2011).

"Assassination" is dealt within Chap. 7. Originally written in the aftermath of the unsuccessful attempts to kill Saddam Hussein during Operation Desert Storm in 1991, the piece has since provided the foundation for much of the later research on targeting specific individuals. It traces the history of the prohibition on assassination in international humanitarian law, examines contemporary norms, considers assassination as a defensive act under the *jus ad bellum* and concludes with a case study of US domestic limits imposed following the famous Church Committee investigations. The analysis remains relevant in light of subsequent attempts to target Slobodan Milosevic during Operation Allied Force in 1999, the failed efforts to decapitate the Iraqi leadership during Operation Iraqi Freedom in 2003, and the current Israeli targeted killing policy. Chapter 5 applies much of the analysis first set forth in this chapter over a decade earlier to its examination of contemporary enemy leadership targeting. Interestingly, the Israeli Supreme Court, in its 2006 decision on targeted killings, dealt with the issue in the context of direct participation in hostilities by civilians, the subject of Chap. 10. The three chapters should accordingly be read together to acquire a full understanding of this complicated subject.

As with leadership targeting, the Gulf War of 1991 prompted awareness of the deleterious environmental consequences of warfare. For reasons that remain undetermined, Iraqi forces set hundreds of Kuwaiti oil wells ablaze and released huge quantities of oil into the Persian Gulf. Chapter 8 assesses these actions in the context of customary IHL, treaty law such as Additional Protocol I's environmental provisions, and various soft law instruments. It challenges the prevailing attitude that international law sufficiently protects the environment, instead asserting that the relevant law is impractical, inadequately precise, and internally incoherent.

The final chapter of Part III addresses a subject that attracted much interest when the capability was being developed over a decade ago, and which is again the focus of frenzied analysis, computer network attack. Chapter 9 is a bookend to Chap. 1; whereas the latter deals with CNA's *jus ad bellum* implications, the former considers its IHL strictures. Of particular interest is the discussion of the term "attack". A major point of contention in IHL circles is whether a cyber-operation which neither damages objects nor harms individuals can be classified as an attack, such that its use against civilians and civilian objects is prohibited. This chapter takes the position that operations of this nature do not so qualify, although experts remain divided on the issue. It also addresses numerous other issues raised by cyber operations, such as cyber-perfidy.

Part IV includes two chapters exploring civilian loss of protection against attack and a chapter examining the investigation of alleged violations of the law of war. The first two deal with issues that arose during the Balkans operations of the 1990s, but later resurfaced during debates about Operations Enduring Freedom in Afghanistan and Iraqi Freedom in Iraq. The third addresses the law of investigations, a topic brought into focus by allegations that Israel failed to adequately examine possible IHL violations following Operation Cast Lead, its 2006 incursion into Gaza, and the 2010 incident involving breach of its blockade of Gaza, which involved the death of nine individuals aboard one of the breaching vessels.

Chapter 10 explores the controversial subject of direct participation in hostilities. Under IHL, civilians who directly participate in hostilities forfeit their protections for such time as they so participate. Sadly, the phenomenon of civilians on the battlefield—ranging from private military contractors to insurgents—is growing. Accordingly, in 2003 the International Committee of the Red Cross launched a major project to elucidate the parameters of the rules which withdraw protection from civilians while they are involved in armed conflicts. The result was its 2009 publication of the *Interpretive Guidance on the Notion of Direct Participation in Hostilities*. Although the *Guidance* marks a significant contribution to understanding the concept of direct participation, it is, in the view of many critics, flawed in a number of ways. This chapter analyzes the disagreements, paying particular attention to whether the *Guidance* represents a fair balancing of military necessity and humanity.

Conflict in the last two decades has also witnessed growing use of human shields, although the practice is by no means new. Chapter 11 argues that in order to understand the norms governing the use of human shields, it is necessary to distinguish between those who voluntarily shield military objects and those who are forced to do so. In great part, the treatment of the former is determined by whether they are considered direct participants in hostilities. As to the latter, disagreement exists over whether the enemy's illegal use of involuntary shields to protect military objectives should affect an attacker's legal obligations vis-à-vis civilians in a target area. Consensus among experts on the matter remains elusive and the debate continues.

The book concludes in Chap. 12 with an examination of the law governing investigations of international law violations occurring during armed conflicts. The matter arose in response to allegations that the Israelis and Palestinians have failed to adequately investigate possible violations during their conflicts. However, it is a subject of much wider application. The chapter identifies the applicable norms of international humanitarian and human rights law, and discusses the complex interplay between the bodies of law in this regard. Since the extant rules lack specificity, State practice is catalogued in an attempt to infuse them with granularity. Ultimately, the viability of IHL depends on the existence of effective and efficient means of identifying possible breaches, as well as robust measures to respond to them.

No work of this nature would be possible without the inspiration, guidance and support of mentors. I have been blessed with many. In this regard, four stand out

and are due special appreciation: Michael Reisman, the Myres S. McDougal Professor of International Law at Yale law School; Leslie Green, University Professor Emeritus at the University of Alberta; Jack Grunawalt, Professor Emeritus at the United States Naval War College; and Yoram Dinstein, Professor Emeritus at Tel Aviv University. Although the propositions set forth in this book are entirely my own, each of them has deeply influenced my work over the years. They have earned my enduring gratitude.

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